Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1086

WHEELER G. FOSHEE, JR. and EUGENE C. FOSHEE,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
For the Fifth Circuit

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To the United States Circuit Court of Appeals
For the Fifth Circuit

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on December 12, 1979.

I

CITATION TO OPINIONS

The Opinion of the Fifth Circuit herein is at this time unreported and is printed in Appendix A hereto. The Opinion of the Court reversing a prior judgment of conviction of the Petitioners on March 10, 1978 is reported as *United States* v. *Foshee,* 569 F.2d. 401 and denial of the Government's Petition for Rehearing of said Judgment of Reversal on August 24, 1978 is reported as *United States* v. *Foshee,* 578 F.2d. 629. Reference is made to these reported Opinions for that in the trial of the

case on remand after its reversal, practically the same evidence was adduced as in the first trial wherein the Foshees were convicted, but there being no dispute between the parties that the Record was substantially the same on both Appeals insofar as testimony is concerned.

II

JURISDICTION

The Judgment of the Circuit Court of Appeals herein was entered on November 8, 1979. Rehearing was denied on December 12, 1979. The jurisdiction of this Court is invoked under 28 USC, §1254(1).

III

QUESTIONS PRESENTED

1. Whether the Court of Appeals departed from its own teachings and the rationale of the prior Panel which reviewed this case on its first Appeal and is in conflict with its own Decisions in the following particulars:

   (a) The impact of the Alabama Worthless Check Act, formerly Title 14, §234 (9) and §234 (12), Alabama Code 1940, now §13-4-112 and 113, Alabama Code 1975;

   (b) In respect to the "Reasonable Expectation of Payment" Doctrine;

   (c) As regards the special rule applicable to circumstantial evidence cases.

2. Whether the affirmance of the Court of Appeals involves important legal considerations erroneously ruled upon by the District Judge relating to the admission of extrinsic evidence in following the philosophy of *United States* v. *Beechum,* 582 F.2d. 898 (5th Cir. 1978).

3. Whether in the prosecution of Mail Fraud cases, 18 USCA §1341, the non-violation by the Defendants of State Statutes relating to the transactions involved is to be totally ignored.

IV

STATE AND FEDERAL STATUTES INVOLVED

Pertinent portions of the Alabama Worthless Check Act above mentioned are set out in Appendix B hereto. Relevant excerpts from the United States Mail Fraud Statute are recited in Appendix C hereto.

V

STATEMENT OF THE CASE

Petitioners adopt, as did the Fifth Circuit in its Opinion rendered November 8, 1979 here sought to be reviewed via Certiorari, the description of the issues and evidence thereon as stated in *United States* v. *Foshee,* 569 F.2d. 401, pp. 402-403 and *United States* v. *Foshee,* 578 F.2d. 629, pp. 630-633. Material excerpts from the Court's initial Opinion, 569 F.2d. 401, are detailed in Appendix D hereto and relevant statements concerning the factual issues abstracted from 578 F.2d. 628 are the subject of Appendix E hereto.

As the foregoing demonstrates, there was substantial, credible and virtually undisputed testimony that at the time of and prior to their purported "check kiting" operation the Foshees were credit worthy, had standing arrangements with the various Banks involved which had prevailed over the years for their checks to be honored when presented, whether there were sufficient funds in their accounts to cover the same or not and that all kited checks were made good before it became known to the Petitioners that they were under investigation for violation of the United States Mail Fraud Statute. In short, there was such abundant and uncontroverted proof that the Foshees had

established credit sufficient to take care of the checks charged in the indictment as having been kited when the same were presented for payment that it is extremely doubtful they could have been convicted on these transactions for violations of the Alabama Worthless Check Act. A strong argument as to their *"reasonable expectation of payment"* was available by virtue of the undisputed evidence adduced and it was the contention of Counsel for the Defendants that the Jury was due to be instructed in some degree and manner as to these considerations, with such caveat as the Court might impose. The District Judge, however, refused each of the Written Instructions submitted to him in these connections on behalf of the Defendants and specifically declined to charge the Jury under any circumstances as to the bearing of the Alabama Worthless Check Act on the activities of the Foshees.

In the heavily boiler-plated Oral Charge to the Jury which comprises twenty-six pages of the Transcript, the Trial Court limited its sole reference to Petitioners' defense of *"Reasonable Expectation of Payment"* to the following neutralized statement:

> "* * * you may consider evidence on the issues of good faith and intent to defraud as to whether the fact that the Defendants had reason to believe that legitimate sources of income or funds possessed or anticipated by them would suffice to make the checks good. Now, that doesn't mean that making the checks good that were not originally good eliminates the crime if a crime was previously committed."

No evidence was presented which directly connected the Defendant Crum Foshee with the uttering of any of the checks attributed in the indictment against him nor was any proof adduced from which it could be remotely inferred that he had any knowledge of their making other than that he was a partner with his brother in the family business, however being busily engaged in the period of the transactions sued upon in Montgomery,

Alabama discharging his responsibilities as a State Senator. At best, therefore, the case against Crum Foshee was made out through circumstantial evidence, yet the Trial Judge failed to instruct the Jury as to the weight to be accorded circumstantial evidence and in line with the teachings of the Fifth Circuit that such is to be scrutinized with the utmost care.

Also during the trial Prosecution was permitted to introduce evidence of activities of the Foshees several months prior to their engagement in the transactions charged against them in the indictments and which the Government also claimed constituted check kiting. No loss resulted to anyone in respect to the clearance of the checks which were drawn by the Foshees during this previous period. Testimony in this connection, however, despite the speculative nature of its meaning plus the prejudicial effect of the same, was allowed as "extrinsic evidence" in keeping with the rationale of the split decision of the en banc hearing of the Fifth Circuit in *United States* v. *Beechum,* supra.

VI

REASONS WHY WRIT SHOULD BE ALLOWED

1. The Judgment of the Court and Opinion Thereon Is In Sharp Conflict With Other Decisions of the 5th Circuit.

In *Strauss* v. *United States,* 376 F.2d. 416 (5th Cir. 1967), Judge Goldberg, speaking for the Court, pontificates on the subject of a Trial Judge's obligation in connection with Jury instruction as follows:

> "It is elementary law that the defendant in a criminal case is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence. Perez v. United States, 5 Cir. 1961, 297 F.2d. 12, 13-14. * * * * * * * * If the trial judge evaluates or screens the evidence supporting a proposed defense, and upon such evaluation declines to charge on that defense, he dilutes the defendant's jury trial by removing the issue from the jury's consideration. * * * * * * * *"

Conformity with the foregoing constituted a vital obligation on the part of the Trial Judge in the case sub judice to fully educate the Jury with such qualifications as might be indicated concerning each of the defenses interposed by the Petitioners. These included insistence by the Foshees that they had reasonable expectation of payment of the checks in issue when they were drawn and, further, that no fraud was involved because their credit standing at the Banks where they were to be presented for payment was strong enough to insure their being honored whether sufficient funds were on hand to cover the same or not. Under the circumstances, they could not be held guilty of violation of the Alabama Worthless Check Act or any Criminal Statute relating to obtaining money by false pretense.

The defenses aforementioned were well supported in the evidence via testimony in the premises which the Court allowed to be admitted as having material bearing on the issues. Such proof was not only substantial, it was virtually uncontradicted and its applicability was buttressed by the footnoted observation of the Panel comprised of Brown, Chief Judge, Coleman and Tjoflat, Circuit Judges, in their Per Curiam Opinion denying the Government's Petition for Rehearing of the reversal in *United States* v. *Foshee,* 578, F.2d. 629 at p. 631 wherein it is stated:

> "Interestingly enough, since no federal statute explicitly makes the kiting of checks a crime, the mail fraud charge draws on many non-federal statutory sources. For example, the Alabama Worthless Check Act exempts a person from criminal liability for check kiting if the drawer has 'enough credit with the depository' * * * * * * * *."

On the second trial, Judge Johnson flatly refused to educate the Jury in respect to the intendments of the Alabama Worthless Check Act in any manner whatsoever and as regards the Foshees defense of "reasonable expectation of payment", he watered down his Oral Charge on said subject to one isolated mention of this doctrine and in the same breath neutralized its application. Thus, in twenty six pages of Oral Charge, the Foshees defenses concerning their credit worthiness were treated and the several Written Charges submitted on behalf of the Defendants were refused in toto. These errors were raised on Appeal and a different Panel of the Fifth Circuit declined to go along with the teachings of their brethern in the earlier case decided on the same facts; wherefore, a conflict on these points exists in the said Court of Appeals which is difficult to understand but being of sufficient importance to merit the attention of the Supreme Court in the premises.

Another deficiency in the Charge of the District Court was the omission of any reference to the special rule endorsed by the Fifth Circuit concerning circumstantial evidence. Here, if any case sufficient for the Jury's consideration was made out against Crum Foshee, it was on account of possible inferences which could be drawn from the circumstance of his being a partner in the family business which negotiated the checks described in the indictment since there was no direct proof as to his knowledge or connection, if any, with the same. In *Barnes* v. *United States,* 341 F.2d. 189, 5th Cir. 1965, at p. 192, it is exposited that *"In a criminal case based substantially upon circumstantial evidence * * *, the Court must assiduously adhere to the requirement that circumstantial evidence be sufficiently convincing to prove guilt, and that the surrounding circumstances must have such force and bearing as to justify the Jury in finding that they were not only consistent with the defendant's guilt but inconsistent with his innocence."*

We, therefore, have here outstanding the conviction of Crum Foshee on circumstantial evidence in a situation where the Jury was never instructed as to the effect of such testimony and the weight to be given the same. This also is contrary to the teachings of the Fifth Circuit.

2. Is the Fifth Circuit Correct In Its View As to the Admissibility of Extrinsic Evidence As Rationalized By a Divided Court, En Banc, In United States v. Beechum, 582 F.2d. 898?

In the trial of this case which was concluded on November 10, 1978, the District Judge admitted evidence concerning prior Banking transactions of the Foshees which seemed to involve some of the attributes of a check kiting operation but few, if any, of the requirements necessary for a conviction of violation of the United States Mail Fraud Statute. At the time, *United States* v. *Beechum,* supra, had been decided on October 25, 1978 and the Opinion of the Fifth Circuit was in slip form, the

same being used as a guideline by the Trial Judge and in justification of his admission of the extrinsic evidence aforementioned. Beechum was decided by an en banc Court with five of the Circuit Judges dissenting. The thirty-page Opinion therein assumes so many different positions, varied points of view and vague reasoning, it is very hard to follow. On this account and because the liberal principles favoring admissibility of extrinsic evidence henceforth will undoubtedly have a detrimental effect on the rights of those criminally accused, we submit that its teachings are of sufficient importance to be studied by this Court and some sensible rule extracted from the chaos and confusion which *Beechum* brings.

3. Should, In the Prosecution of Mail Fraud Cases, the Non-Violation By the Defendants of State Statutes Concerning the Transactions Involved Be Completely Disregarded?

In the trial of the case below, Judge Johnson, once reversed in a conviction of the Foshees on the same facts, refused to follow the footnoted observations of the Court of Appeals in *United States* v. *Foshee,* 578 F.2d. 629 at p. 631 apropos the Alabama Worthless Check Act, in which connection we are constrained to opine that Judges Brown, Coleman and Tjoflat must have considered the same to have had some bearing on the issues or they would not have gone to the trouble of writing with reference to said Statute. The second Panel which reviewed the subsequent conviction of the Foshees on the same set of facts as in the first case also declines to accord the Alabama Worthless Check Act as being due any consideration, asserting as their reason the general statement that *"The Federal Mail Fraud Statute prohibits use of postal services in the furtherance of fraudulent schemes, whether or not prohibited by State Law",* citing several cases, including *Badders* v. *United States,* 240 U.S. 391, 393, 36 S.Ct. 367, 60 L.Ed. 706 which, when read, seems to have very little to do with a situation such as we have here. In any event, we seriously suggest that it cannot be said

that in each and every instance where mail fraud is charged State Criminal Statutes which relate in some degree to the scheme employed are to be totally disregarded as if they did not even exist. The alleged scheme in this case, in order to have been fraudulent, necessarily would have required a violation of the Alabama Worthless Check Act.

We think that it is not good for an erroneous concept which may be sound, as a general proposition, to become embedded in the law as if cast in concrete where the circumstances are such that the impact of State law cannot be avoided.

CONCLUSION

For the reasons heretofore assigned and above briefly discussed, Petitioners pray that a Writ of Certiorari be issued to the United States Court of Appeals for the Fifth Circuit in the premises.

Respectfully submitted,

James E. Clark

APPENDIX

APPENDIX A

United States Court of Appeals
Fifth Circuit

UNITED STATES of America,
Plaintiff-Appellee,

v.

Wheeler G. FOSHEE, Jr. and
Eugene C. Foshee,
Defendants-Appellants.

No. 79-5109

November 8, 1979

Following remand, 569 F.2d 401, modified on rehearing, 578 F.2d 629, defendants were convicted in the United States District Court for the Middle District of Alabama, Frank M. Johnson, Jr., J., of mail fraud, and they appealed. The Court of Appeals, Hatchett, Circuit Judge, held that: (1) evidence of failure to repay loans obtained in order to cover kited checks was admissible to show defendants' intent to defraud at time checks were kited; (2) evidence was sufficient to support conviction; (3) letter from bank executive describing dealings between bank and defendants was properly excluded; (4) government charts used at trial to help demonstrate scheme were properly admitted, and (5) there was no error in failing to charge jury under Alabama Worthless Check Act.

Affirmed.

Alvin B. Rubin, Circuit Judge, concurred in result.

1. Criminal Law (key) **338(1)**

Trial judges have broad discretion in determining relevancy of evidence.

2. Post Office (key) **49(5)**

In mail fraud prosecution, government may introduce any evidence remotely bearing on question of fraudulent intent. 18 U.S.C.A. § 1341.

3.Post Office (key) **49(5)**

In mail fraud cases, evidence was not limited to proof of losses to intended victims. 18 U.S.C.A. § 1341.

4. Post Office (key) **49(5)**

In mail fraud prosecution, evidence of failure to repay loans obtained in order to cover kited checks was admissible to show defendants' intent to defraud at time checks were kited. 18 U.S.C.A. § 1341.

5. Post Office (key) **49(11)**

Evidence was sufficient to support mail fraud conviction. 18 U.S.C.A. § 1341.

6. Criminal Law (key) **433**

In mail fraud prosecution, letter from bank executive describing dealings between bank and defendants, which was not prepared in routine operation of business and did not meet "business record" exception to hearsay rule, was properly excluded from evidence. 18 U.S.C.A. § 1341; 28 U.S.C.A. §1732.

7. Criminal Law (key) **437**

In mail fraud prosecution, government charts used to help demonstrate scheme were properly admitted. 18 U.S.C.A. § 1341.

8. Criminal Law (key) **814(1)**

In mail fraud prosecution, district court's failure to charge jury under Alabama Worthless Check Act was not error. 18 U.S.C.A. § 1341; Code of Ala., Tit. 14, § 234(12).

9. Post Office (key) **35**

Federal mail fraud statute prohibits use of postal services in furtherance of fraudulent schemes, whether or not prohibited by state law. 18 U.S.C.A. § 1341.

Appeal from the United States District Court for the Middle District of Alabama.

Before FAY, RUBIN and HATCHETT, Circuit Judges.

HATCHETT, Circuit Judge:

Defendants appeal their conviction and sentence for mail fraud. 18 U.S.C. § 1341.[1] We affirm.

A description of the check kiting scheme giving rise to the mail fraud prosecution appears in *United States* v. *Foshee,* 569 F.2d 401 (5th Cir.), modified on petition for rehearing, 578 F.2d 629 (5th Cir. 1978). Because the trial judge prevented the

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[1]The statute provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

defense from arguing that lack of intent to defraud could be inferred from payment of the kited checks, we reversed and remanded for new trial. On remand, the government introduced evidence that loans were unpaid at the time of trial. The primary issue is whether the trial court committed reversible error by admitting this evidence.

Evidence Of Unpaid Loans

[1] The evidence showed that loans obtained in order to cover the kited checks were not paid, resulting in losses to various lending institutions.[2] The defendants claim this evidence is irrelevant and prejudicial.[3] We disagree. Trial judges have broad discretion in determining relevancy. *Perkins* v. *Volkswagen of America, Inc.*, 596 F.2d 681, 682 (5th Cir. 1979); *Wright* v. *Hartford Accident & Indemnity Co.*, 580 F.2d 809, 810 (5th Cir. 1978). The district judge found the questioned evidence relevant to the issue of intent to defraud. The finding was within his discretion.

[2-4] The difficulty in proving specific intent to defraud in mail fraud cases has resulted in a "liberal policy as to the admission of evidence tending to prove good or bad faith." *United States* v. *Diamond,* 430 F.2d 688, 692 (5th Cir. 1970); *see, United States* v. *Foshee,* 578 F.2d at 632. This policy is broad enough to permit testimony showing that all of the questioned drafts were paid off and that none of the banks suffered a loss

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[2]It was conceded at trial that certain of these loans were "not paid off at a satisfactory rate" and that some were converted into civil judgments which have not been paid.

[3]Defendants also argue the evidence of unpaid loans was extrinsic and inadmissible under *United States* v. *Beechum,* 582, F.2d 898 (5th Cir. 1978). The government asserts the evidence was non-extrinsic, relevant, and admissible. Assuming for the purposes of this case that the testimony was extrinsic evidence of other acts or offenses, we find it admissible under *Beechum.*

from the check kiting operation. *Id.,* 569 F.2d at 403. The policy extends equally far in the other direction to permit the government to introduce any evidence remotely bearing on the question of fraudulent intent. *United States* v. *Brandt,* 196 F.2d 653, 657 (2nd Cir. 1952). This includes evidence that loss was sustained as a result of the scheme. *United States* v. *Foshee,* 578 F.2d at 633; *United States* v. *Regent Office Supply Co. Inc.,* 421 F.2d 1174, 1181 (2nd Cir. 1970). Fraudulent intent is supported by "proof that *someone* was actually victimized by the fraud." *Id.,* at 1181 (emphasis added). In mail fraud cases, evidence is not limited to proof of losses to intended victims. We hold that evidence of failure to repay loans obtained in order to cover kited checks is admissible to show the defendants' intent to defraud at the time the checks are kited. Accordingly, we find no error on this point.

Other Complaints

[5] It is argued that the evidence was insufficient to support Eugene Foshee's conviction. Considering the evidence in the light most favorable to the government, we find sufficient evidence to support the conviction. *Glasser* v. *United States,* 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States* v. *Zweig,* 562 F.2d 962, 963 (5th Cir. 1977).

[6] Defendants next contend that the court erred in excluding from evidence a letter from a bank executive describing dealings between the bank and the defendants. The letter was not prepared in the routine operation of the business and did not meet the "business record" exception to the hearsay rule. 28 U.S.C. § 1732.

[7] Defendants further contend that it was error to admit government charts used to help demonstrate the scheme. This claim is also without merit. The charts were based on competent evidence previously admitted, and the judge instructed the jury that the charts had "no independent evidentiary value," but

were used "merely to demonstrate" certain testimony already in evidence. They were, therefore, properly submitted to the jury. *Gordon* v. *United States,* 438 F.2d 858, 876 (5th Cir. 1971); *Patton* v. *Archer,* 590 F.2d 1319, 1323 (5th Cir. 1979).

[8,9] Finally, defendants cite as error the district court's failure to charge the jury under the Alabama Worthless Check Act, Ala.Code, Title 14, § 234(12). The point is without merit. The federal mail fraud statute prohibits use of postal services in the furtherance of fraudulent schemes, whether or not prohibited by state law *Parr* v. *United States,* 363 U.S. 370, 390, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960); *Badders* v. *United States,* 240 U.S. 391, 393, 36 S.Ct., 367, 60 L.Ed. 706 (1916); *United States* v. *Williams,* 545 F.2d 47, 50 (8th Cir. 1976).

The convictions are AFFIRMED.

ALVIN B. RUBIN, Circuit Judge, concurs in the result.

APPENDICES B and C

EXCERPTS FROM THE ALABAMA WORTHLESS CHECK ACT AND U. S. MAIL FRAUD STATUTE

Formerly Title 14, §234(9), Ala. Code, 1940, now §13-4-112, Ala. Code, 1975:

Intent of Legislature. It is the purpose of this division to provide a remedy for the evil of giving checks on a depository without first providing sufficient funds or credit in such depository to pay the checks on presentment after the payment date written on the check. Also, it is the purpose of this division to remedy the situation where a check is given on a nonexistent depository or on one where the drawer has no account. Such present activity tends to create the circulation of worthless checks on banks, bad banking, check kiting and a mischief to trade and commerce.

Formerly Title 14, §234(12), Ala. Code, 1940, now §13-4-113, Ala. Code, 1975:

Issuing Check without sufficient funds or credit. It shall be unlawful for any person to draw a check, or to cause or direct the drawing of a check, with intent to defraud, on any depository, knowing at the time of the drawing of such check that the maker, drawer or payer thereof does not have sufficient funds on deposit in or enough credit with the depository for the payment in full of such check and all other checks upon such funds or credit then outstanding. This section shall also apply to, but not be limited to, postdated check where the person drawing the postdated check, or causing such to be drawn, does not notify the payee that the check is postdated or make an arrangement with the payee to hold the check.

Title 18, §1341, USC:

Frauds and Swindles. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, * * * * for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years or both.

APPENDIX D

EXCERPTS FROM UNITED STATES V. FOSHEE, 569 F.2d. 401 CONSTITUTING STATEMENT OF FACTS:

"Two members of a prominent Alabama farming family, one a state legislator at the time in question, appeal their convictions for mail fraud. * * * * * * *

The Foshees operated a farm of 2,000 acres, a farm supply company, and a milling company, and engaged in various other agricultural enterprises. It was a large business which at peak times of the year required a tremendous cash flow. *They had extensive credit arrangements with several area banks and were generally regarded as good customers.* Their problems began after a series of bad crops and natural disasters caused financial setbacks.

Prior to 1974 the Foshees had maintained their business accounts with two banks. In 1974, they opened accounted in four other banks. The indictment charges that beginning on December 19, 1974 and continuing until January 21, 1975, and beginning on February 10, 1975 and continuing until March 20, 1975 they made a series of deposits and withdrawals, knowing that there were not and would not be sufficient funds in the accounts of the drawee banks to cover the checks, other than floating funds created by the rapid succession of other checks which the Foshees knew or should have known were also insufficient fund checks.

* * * * * * *

To prove their good faith, the Foshees offered testimony to the effect that no bank complained of a loss and that the drafts were all paid, as well as on what the Foshees thought were customary banking practices." (Emphasis Added)

APPENDIX E

EXCERPTS FROM UNITED STATES V. FOSHEE, 578 F.2d. 659 CONSTITUTING STATEMENT OF FACTS:

"The total potential loss to all six banks on the checks written by the Foshees was approximately $289,000.00. But the interestingly twist to this case is that bank officials testified the checks were paid and that the banks suffered no financial loss.[1] R. vol. 2, at 52, 76, 96, 125-26, 148 and 172. Several checks were paid in the last week in March, and all, except for about $25,000 worth, were paid by April 7. About one-half the remaining amount was paid on May 17, and the final overdraft was covered on October 14, 1975.[2] R. vol. 3 at 322-23, 334-44.

The postal authorities initiated their investigation on May 14, 1975. Defendant E. C. (Crum) Foshee testified that he was advised of the alleged check kiting for the first time in the last week of June when he was called for questioning by the post office officials. Wheeler Foshee, the other defendant, was not called for an interview until several months later. Crum Foshee

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[1]Although the checks were paid, a state bank examiner said that a loss still occurred because the banks could have been paid interest for the "unauthorized loans" occurring as a result of the alleged check kite. R., vol. 3 at 294-95. Bank officials, however, specifically stated to the jury that the banks lost no money.

[2]The defendants persuasively demonstrate that the over-draft paid on October 14, 1975, was akin to a regular loan. An insufficient funds check had been written on an account in the Bank of Brewton, but instead of returning the check, the bank chose to process it as an overdraft on April 10. The bank charged interest just like a loan. In fact, the Executive Vice President of the Bank of Brewton indicated that the bank was willing to hold the overdraft because the Foshees had an outstanding loan with the bank secured for $100,000 more than the amount of the loan itself. And he had "authority to apply anything that comes in or goes out to an existing note. . . ."

contends, moreover, that none of the six banks at any time complained to him about the possibility of a check kiting scheme.

* * * * * * *

Evidence during the trial also revealed an interesting picture of the banking practices with which the Foshees were familiar. *The Executive Vice President of the Bank of Brewton, for example, testified that 'it is our practice to let people draw against uncollected funds'.* R. vol. 2, at 100. The President of the Citizens National Bank of Opp explained that a note on a loan outstanding to the Foshees allowed the bank to 'hold that security against any other indebtedness that the Foshees may incur against [the] bank'. Id. at 146. *The President and Chairman of the Board of the Conecuh County Bank of Evergreen stated in a letter that 'for a number of years [the Foshees] used this bank as their major operating account, and at times this account would show overdrafts which were always covered and was to be expected in a large operation as was the case of the Foshees.* Our dealings with the Foshees have been satisfactory in every respect, and they have always done just what they said they would do. . . . We have never lost any money on any checks or other transactions with the Foshee boys'. Id. at 175. *The Foshees, in particular, had an arrangement with the Conecuh County Bank whereby their cotton gin account could be overdrawn during cotton ginning season and the bank would charge them interest.* Although it was not a written loan agreement, the Foshees would apply their cotton receipts as collateral for the overdrafts. Id. at 167-71."

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(Emphasis Supplied)